

SOUTHERN ENVIRONMENTAL LAW CENTER

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April 18, 2018

VIA FOIAonline (foiaonline.regulations.gov) and U.S. MAIL

Gayla Mendez
Regional Freedom of Information Officer
U.S. EPA, Region 4
AFC Bldg., 61 Forsyth Street, S.W., 9th Flr. (4PM/IF)
Atlanta, GA 30303-8960

Re: Freedom of Information Act Request: Tennessee Valley Authority's Allen Fossil Plant, TVA's Allen Combined Cycle Plant, and the Memphis Sand Aquifer

Dear Ms. Mendez:

On behalf of Protect Our Aquifer and the Tennessee Chapter Sierra Club, under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, the Southern Environmental Law Center ("SELC") requests the following documents, both in final form and all drafts, relating to groundwater contamination at or near the Tennessee Valley Authority's Allen Fossil Plant in Memphis, Tennessee:

1. From July 1, 2015, to the date upon which this request is processed, all documents, including email correspondence, between EPA and (a) the Tennessee Valley Authority ("TVA"), (b) the Tennessee Department of Environment and Conservation ("TDEC"), (c) the University of Memphis, (d) the United States Geological Survey ("USGS"), (e) Memphis Light, Gas, and Water ("MLGW"), (f) the City of Memphis, or (g) Shelby County, Tennessee regarding TVA's implementation of the requirements of the federal Coal Ash Rule and the federal Clean Water Act at the Allen Fossil Plant, including but not limited to any comments EPA has provided to these entities and any responses to those comments; and
2. From July 1, 2016, to the date upon which this request is processed, all documents, including email correspondence, between EPA and (a) TVA, (b) TDEC, (c) the University of Memphis, (d) USGS, (e) MLGW, (f) the City of Memphis, or (g) Shelby County, Tennessee regarding (1) the TVA's Allen Fossil Plant and/or Combined Cycle Plant and (2) the Remedial Investigation initiated by TVA in 2017 at the request of the Tennessee Department of Environment and Conservation, including but not limited to any comments EPA has provided on any component of the Remedial Investigation and any responses to those comments.

Consistent with our prior conversations regarding the scope of FOIA Request No. EPA-R4-2018-002249, for the purposes of this request, the term “documents” includes all written, printed, recorded or electronic: materials, communications, correspondence, emails, memoranda, notations, copies, diagrams, charts, maps, photographs, tables, spreadsheets, formulas, directives, observations, impressions, contracts, letters, messages and mail in the possession or control of the Environmental Protection Agency or its agents.

FOIA requires a responding agency to make a “determination” on any request within twenty (20) working days of receipt. *See* 5 U.S.C. § 552(a)(6)(A)(i). The statute favors disclosure of records and instructs the agency to withhold information only in narrowly defined circumstances in which the agency can articulate a reasonably foreseeable harm protected by an exemption. *See id.* at § 522(a)(8)(A)(i). FOIA also requires the release of all reasonably segregable portions of a document that are themselves not exempt. *Id.* § 552(b). Should the EPA deny this request, the EPA must inform SELC of the grounds for denial and the specific administrative appeal rights which are available. *See Id.* § 552(a)(6)(A)(i).

Protect Our Aquifer and Sierra Club are requesting photocopies without charge, or at a reduced charge, because reduction or waiver of fees would be in the public interest. A disclosure is in the public interest if: (1) it is likely to contribute significantly to public understanding of the operations or activities of the government, and (2) it is not primarily in the commercial interest of the requester. The public interest standard of the fee waiver provision of the FOIA should be “liberally construed” in favor of waivers. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987); *Pederson v. Resolution Trust Corp.*, 847 F. Supp. 851, 855 (D.Colo.1994); *Etlinger v. FBI*, 596 F. Supp 867, 872 (D. Mass. 1984). The goal of the statute is to avoid the “roadblocks and technicalities which have been used by various Federal agencies to deny waivers....” *Pederson*, 847 F. Supp. at 855.

Protect Our Aquifer is a Tennessee non-profit organization whose mission is to support the protection and conservation of the Memphis Sand Aquifer for the benefit of present and future generations. *See* 5 U.S.C. § 552 (a)(4)(A)(iii). Two of Protect Our Aquifer’s primary objectives are to “[r]aise public awareness of the Memphis Sand Aquifer and its value to the community” and “[t]o provide public oversight of TVA’s Remedial Investigation Work Plan [at Allen]....”¹ Toward those ends, Protect Our Aquifer maintains a website and Facebook page that includes both general and topic-specific information regarding the matters with which Protect Our Aquifer is involved, including TVA’s plan to operate groundwater production wells at the Allen Combined Cycle Plant. Protect Our Aquifer collects news articles related to these issues and provides them as a resource to the public through its website.² Board members of Protect Our Aquifer are interviewed by the media to explain their work and its significance and also speak at public meetings and conferences on particular topics relevant to protecting the aquifer.

The Sierra Club is a nonprofit organization founded in 1892 that has grown to include over 650,000 members nationwide. The Sierra Club is the largest and most influential grassroots environmental organization in Tennessee, with more than 105,000 members and supporters

¹ <http://protectouraquifer.org/>.

² *See* <http://protectouraquifer.org/#news>.

across the state. The Sierra Club works to safeguard the health of our communities, protect wildlife, and preserve our remaining wild places through grassroots activism, public education, lobbying, and litigation. The Sierra Club's organizational mission is "to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives." The Tennessee Chapter Sierra Club maintains a website to disseminate information regarding TVA's actions at the Allen facility and speaks regularly to the media regarding these issues.³

SELC is a 501(c)(3) non-profit organization with over thirty (30) years of experience disseminating public information regarding EPA regulatory and operations issues. *See* 5 U.S.C. § 552(a)(4)(A)(iii). SELC maintains a website that includes both general and topic-specific information regarding the matters with which SELC is involved, including matters related to water pollution at TVA coal plants.⁴ Lawyers at SELC are interviewed by or otherwise provide information to the media to explain their work related to water pollution at TVA coal plants and its significance.⁵ SELC's website contains documents generated by SELC for the specific purpose of educating the public on particular issues. SELC speaks at community meetings on particular topics, including water pollution at TVA coal plants. SELC also assists the public in locating information relating to a particular topic by collecting and posting relevant information, documents, and links to other websites.⁶

Memphis-area news sources have recently reported on public concern regarding TVA's investigation of the risk of polluted groundwater in leaking unlined, pits at the Allen Fossil Plant entering into the Memphis Sand Aquifer, the city's primary drinking water source, as well as contaminants entering the aquifer elsewhere through gaps in the layer of clay separating the aquifer from shallower groundwater:

<http://www.commercialappeal.com/story/opinion/editorials/2017/11/17/protect-aquifer/866266001/>

<http://www.commercialappeal.com/story/news/2017/11/12/toxic-solvent-dry-cleaners-found-memphis-sand-aquifer/849588001/>

³ *See* <https://www.sierraclub.org/tennessee/blog/2017/07/arsenic-and-lead-leaking-tvas-allen-memphis-coal-ash-ponds>.

⁴ *See, e.g.*, <https://www.southernenvironment.org/news-and-press/news-feed/administration-tells-power-plants-they-can-keep-polluting-water> (April 2017); <https://www.southernenvironment.org/news-and-press/news-feed/tva-refuses-to-disclose-water-quality-data-from-leaking-gallatin-coal-ash-s> (January 2017); <https://www.southernenvironment.org/news-and-press/news-feed/lawsuit-threatened-against-tva-for-known-violations-at-leaky-cumberland-fos> (January 2016).

⁵ *See, e.g.*, https://www.nytimes.com/2017/04/15/climate/tennessee-coal-ash-disposal-lawsuits.html?_r=0 (April 15, 2017); <http://www.tennessean.com/story/opinion/2017/05/22/time-tva-state-regulators-step-up/101480930/> (May 22, 2017).

⁶ *See, e.g.*, <https://www.southernenvironment.org/news-and-press/press-releases/drinking-water-supplies-for-over-2-million-people-in-tennessee-at-risk-unde>; https://www.southernenvironment.org/uploads/words_docs/TVAServiceArea_and_CoalPlants_and_DWintakes_2016_0630_final.pdf.

<https://www.memphisflyer.com/NewsBlog/archives/2017/10/25/groups-want-full-investigation-before-firing-up-new-power-plant>

These reports follow news earlier this year regarding the high levels of arsenic and lead found in the groundwater beneath the leaking, unlined coal ash pits at Allen Fossil Plant:

<http://www.commercialappeal.com/story/news/2017/07/12/high-levels-arsenic-lead-found-beneath-tennessee-valley-authority-plant/470096001/>

<http://wreg.com/2017/07/12/arsenic-lead-found-in-groundwater-at-memphis-power-plant/>

In addition to widespread media interest, TVA's coal ash management at Allen Fossil Plant and elsewhere has been the subject of significant scrutiny and criticism from regulators. The Tennessee Department of Environment and Conservation has issued an administrative order to exercise oversight over TVA's implementation of the federal Coal Ash Rule and to address existing coal ash contamination at Allen and other TVA coal plants.⁷ TDEC has sent multiple letters to TVA addressing issues that relate to TVA's ash handling and groundwater contamination at Allen Fossil Plant.⁸

Given Protect Our Aquifer's and Sierra Club's role in disseminating information regarding risks to the Memphis Sand Aquifer and widespread media and regulatory interest in the risk of contamination at Allen Fossil Plant, disclosure of the requested materials will clearly benefit the general public through increased understanding of the risk of contamination of the Memphis Sand Aquifer based on TVA's actions and activities. Protect Our Aquifer and Sierra Club further certify that disclosure of the information sought is not in its commercial interest.

FOIA requires the release of all reasonably segregable portions of a document that are themselves not exempt. 5 U.S.C. § 552(b). Should EPA refuse to provide the information requested, EPA must inform Protect Our Aquifer and Sierra Club of the grounds for its refusal and the specific administrative appeal rights which are available. *See* 5 U.S.C. § 552(a)(6)(A)(i).

Protect Our Aquifer and Sierra Club further requests preparation of a *Vaughn* index to facilitate evaluation of the completeness of TVA's response. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) (index should include a detailed justification for claims of exemption, as well as specificity, separation and indexing of the documents).

Both TVA and EPA are government actors, and the information requested by SELC, Protect Our Aquifer, and Sierra Club is not already available in the public domain to our knowledge.

⁷ *In re Tenn. Valley Auth.*, No. OGC015-0177, 1 (Tenn. Dep't of Env't & Conservation Aug. 8, 2015), https://tn.gov/assets/entities/environment/attachments/TVA_Order_8-6-15.pdf.

⁸ *See, e.g.*, Letter to Winnifred Nanette Brodie, TVA, from Steve Goins, TDEC, re: Tennessee Valley Authority (TVA) Allen Fossil Plant (79-735) Remedial Site Investigation Request (July 18, 2017); Letter to Paul Pearman, TVA, from Chuck Head, TDEC, re: Allen Fossil Plant Environmental Investigation Plan Due Date (February 6, 2017).

Should our request for reduced or waived fees be denied, it is prepared to bear the reasonable duplication and search costs necessary to fulfill this request. However, I request you contact me before processing this request if the fee is expected to be in excess of \$100.00. Protect Our Aquifer and Sierra Club reserve their right to appeal a fee waiver or reduction denial.

Sincerely,

A handwritten signature in blue ink that reads "Anne Passino". The signature is fluid and cursive, with the first name "Anne" and last name "Passino" clearly legible.

Anne E. Passino
*Counsel for Protect Our Aquifer
and Sierra Club*